Supreme Court, U.S.
FILED
OCT 13 1993
OFFICE OF THE CLERK

No. 93-417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REALTY PHOTO MASTER CORPORATION,
Petitioner,

v.

MONTGOMERY COUNTY ASSOCIATION OF REALTORS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO
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* * * * * * * * *

STATEMENT OF THE CASE

Petitioner contends that the Court of Appeals erred in upholding the

District Court's denial of its request for a preliminary injunction.

Respondent, Montgomery County Association of Realtors, Inc.[1]/ (hereinafter "MCAR"), a voluntary association of realtors in Montgomery County, Maryland, operates a Multiple List Service (hereinafter "MLS"). The MLS service consists of a computerized database concerning real estate, primarily residential, that is for sale in and near Montgomery County. This database includes information such as the residence's age, address, lot size, number of bedrooms and bathrooms, mortgage balance, asking price, and broker's commission. MCAR charges members a yearly fee for access to the MLS. Users gain access to the database

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1/ Respondent, Montgomery County Association of Realtors, Inc. has no parent or subsidiary company.

by telephoning MCAR's main frame computer and entering their access code.

MCAR's MLS has changed with the development of technology. At first, MCAR prepared and distributed a separate index card for each listing. The front of the card contained written information and the reverse side contained a photograph of the property. Over time, MCAR replaced the index card with books. The books also included a written description and a photograph of each listing.

In 1978, MCAR computerized its listing service. MCAR found that it was too costly, at that time, to digitize and transmit photographs of the listings. Thus, users of MCAR's system received only the written property description from the computer. From 1978 to 1988, MCAR continued to publish

multiple list books as a supplement to its computer service. In 1988, MCAR discontinued the books. After 1988, photographs were not provided by MCAR of the properties in its MLS.

In 1988, Petitioner began offering a photographic service to MCAR MLS participants. Petitioner would use one of its customer's access codes to dial up the MCAR main frame computer each day to identify new listings. Petitioner then photographed the properties and fed the photographs into its main frame computer which digitized them and down-loaded them automatically into its customer's personal computer. Petitioner provided its customers with software that integrated the pictures with the written MLS that the users obtained from MCAR. Petitioner's customers could display and printout an

image combining its photographs and MCAR's MLS information.

In 1990, MCAR learned that Petitioner was accessing its computer database. MCAR filed suit against Petitioner alleging copyright infringement, trade secrets misappropriation, and breach of contract. Petitioner counterclaimed alleging that MCAR had conspired to restrict trade and to boycott it in violation of the Sherman Antitrust Act.

In October, 1991, MCAR announced to its members, that beginning in January, 1992, it intended to again provide photographs of listed properties to its members. This time the photograph would be available through MCAR's computer network. In November 1, 1991, MCAR selected a vendor to provide on-line photographs for its MLS database.

Petitioner then requested that the District Court issue a preliminary injunction prohibiting MCAR from updating its MLS database to add on-line photographs. Petitioner contended that written listing information and a photograph of a property are two separate products. It argued that MCAR's intent to sell them together constituted an illegal tying arrangement.

Following a three day evidentiary hearing, the District Court denied Petitioner's motion for a preliminary injunction. The District Court held that Petitioner had failed to satisfy the requirements for a preliminary injunction because it failed to prove the elements of its antitrust claim. The District Court held that written listing information and a picture of a property constitute one product - not

two separate products. The District Court's decision was affirmed by the Court of Appeals.

SUMMARY OF ARGUMENT

The Court of Appeals decision is not in conflict with this Court's decisions in Jefferson Parish Hosp., District No. 2 v. Hyde, 466 U.S. 2 (1984) and Eastman Kodak Company v. Image Technical Services, 504 U.S. ____, 112 S.Ct. 2072, 119 L.Ed. 2d 265 (1992). The Court of Appeals employed the proper legal standard in determining that the District Court was correct in its decision that Petitioner had not demonstrated the existence of an illegal tying claim.

ARGUMENT

I. THE COURT OF APPEALS DECISION HOLDING THAT PETITIONER HAD FAILED TO STATE AN ANTITRUST TYING CLAIM, WAS CONSISTENT WITH THE DECISIONS OF THIS COURT.

This case arises from the denial by the District Court, and affirmance of that decision by the Court of Appeals, of Petitioner's request for a preliminary injunction. To obtain injunctive relief, Petitioner had to satisfy the test established in Blackwelder Furniture Co. v. Seilig Mfg. Co., 557 2d. 189 (4th Cir. 1977). Under the Blackwelder test, as applied to the facts of this case, Petitioner was required to demonstrate that grave or serious legal questions were presented. Id. at 195. The District Court concluded that no serious legal question was presented after it held that multiple list information and a picture of the property constitutes only one product and not an illegal tying arrangement. (Pet. App. 56B) [2]/

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[2]/Pet. App. refers to the Appendix to the Petition for Writ of Certiorari.

In reviewing the District Court's determination, the Fourth Circuit looked to the factors recognized by this Court in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) to analyze an illegal tying claim. The primary factor is whether two separate product markets have been linked. Id. at 18.

The Court of Appeals reviewed the District Court's determination that there was only one product involved -information about real estate properties. The District Court's factual findings were: (1) that written and photographic information concerning real estate had traditionally been purchased as a unit by buyers; and (2) that there was not a separate market demand for the photographs without some way to integrate the photographs with MCAR's written information on real

estate listings. The Court of Appeals determined that these findings were not clearly erroneous. The Court of Appeals agreed that photographs and written information constitute a single product and not an illegal tying arrangement. (Pet. App. 14A-15A).

Petitioner argues that the decision by the Court of Appeals is inconsistent with this Court's decision in both Jefferson Parish, and Eastman Kodak v. Image Technical Service, 504 U.S. _____, 112 S.Ct. 207, 219 L.Ed. 2d 265 (1992). Petitioner contends the Court of Appeals employed a "functional relationship" analysis that was rejected in those opinions. This contention is without merit.

In its opinion, the Court of Appeals specifically noted that in determining whether there were separate products, the "functional relationship"

between the products was not the appropriate question. It stated explicitly that the standard to use was the "character of the demand" for the products citing this Court's language from Jefferson Parish. (Pet. App. 14A). The Court of Appeals used that analysis in reviewing the District Court's ruling.

In a related argument, Petitioner contends that since the Court of Appeals made no reference to Eastman Kodak, its opinion must be in conflict with Eastman Kodak. Since Eastman Kodak did not change the tying analysis established in Jefferson Parish, there was no error by the Court of Appeals in not making reference to Eastman Kodak.

II. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER DECISIONS BY THE FOURTH CIRCUIT AND SIXTH CIRCUIT.

Petitioner attempts to argue that

the Court of Appeals decision is in conflict with a prior decision from that Court, Service and Training, Inc. v. Data General Corp., 963 F.2d 680 (4th Cir. 1992). In Service and Training, the Court of Appeals recognized that the "functional relationship" test had been rejected in Jefferson Parish. This same recognition is clearly stated by the Court of Appeals in its decision. (Pet. App. 13A-14A). Thus, there is no conflict with the prior decision of the Fourth Circuit.

Petitioner next alleges a conflict with the Court of Appeals' decision in Associated Press v. Taft-Ingall Corp., 340 F.2d 753 (6th Cir.) cert. denied 382 U.S. 820 (1965). In that case, the Court of Appeals determined that the Associated Press's requirement that subscribers had to buy separate and distinct news wire services together

constituted an illegal tying arrangement. Yet, nothing from that case conflicts with this case. Petitioner's argument that they are analogous cases because in Associated Press the court ruled that news can be more than one product ignores the distinguishing facts of each case.

Petitioner's final two points are an attack upon the Court of Appeals' decision because it "hinders innovation" and "frustrated competition." These arguments consist of no more than Petitioner's view of what factors it would like to see employed in tying cases.

CONCLUSION

Realty Photo's petition for a writ of certiorari should be denied.

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OF REALTORS, INC.

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Dated: October 13, 1993